United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

7416

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23523

GLADYS ANNA HOLDEN
Appellant

v.

ROBERT H. FINCH, ET AL.
Appellees

APPEAL FROM A FINAL ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

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STATEMENT OF QUESTION PRESENTED

Can a probationary employee be dismissed from Federal employment on the basis of her civil rights views and activities?

This case has not previously been before this Court under this or any other title.

REFERENCES AND RULINGS

Notice of the Judgment of the District Court is set forth on page 28 of the Joint Appendix. There are no other references and rulings.

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of Columbia, dated August 1, 1969, granting the Defendants' Motion for Summary Judgment and denying Plaintiff's application for discovery as moot in an action brought by Gladys Anna Holden to declare her dismissal from Government service to be unlawful, and for other relief.

The Plaintiff, Anna Holden, is a resident of the District of Columbia and the Defendants are officials of the United States of America who reside in the District of Columbia. The action arises in the District of Columbia under the Constitution and Laws of the United States and the amount in controversy exceeds $10,000, exclusive of interest and costs. Jurisdiction in the District Court is based on 11 D.C. Code §521, 5 U.S.C. §§701-06, and on 28 U.S.C. §§ 1331, 2201 and 2202.

This Court has jurisdiction to review the order of the District Court under 28 U.S.C. §1291.

Anna Holden is a forty-one year old sociologist. She has earned the degrees of Bachelor of Science and Master of Arts and has accumulated broad experience

in sociology with particular emphasis on racial integration in the field of education (Exhibit A-1, pp. 2-6, to Defendants' Motion for Summary Judgment).

On January 11, 1965, Anna Holden became an employee of the federal Government, designated Education Research and Program Specialist, (Research Assistant), GS-11, Step 1, $8,650 per annum, in the Equal Educational Opportunities Program, Office of Commissioner, Office of Education, Department of Health, Education and Welfare. Miss Holden's appointment was subject to a one-year probationary period commencing January 11, 1965 (Exhibit A-3 to Defendants' Motion for Summary Judgment).

At the time of her appointment, Anna Holden was deeply committed to the cause of racial integration; she had been active as a member and officer of the Congress of Racial Equality (CORE) since 1956; she had participated actively in efforts to desegregate schools, public accommodations and housing; and she had been arrested twice for CORE-sponsored sit-ins, in 1963 and 1964. All of this was known to her employer at the time she was appointed (Exhibit A-1, pp. 4-8, to Defendants' Motion for Summary Judgment).

After her appointment to federal service, Miss Holden continued to be active on her own time in CORE

matters in the Washington, D.C., metropolitan area, including participation in peaceful public demonstrations (Plaintiff's Statement of Material Facts, Par. 7, J.A. p. 22). In addition, Miss Holden was openly concerned during office hours with advancing the cause of integration. She urged the Office of Education, and particularly her supervisor, Mr. David Seeley, to take stronger affirmative action to desegregate public schools in the United States (Plaintiff's Statement of Material Facts, Par. 10, J.A. pp. 22-23).

Miss Holden's outside activities for CORE, and her advocacy of a desegregated public school system during office hours, were not inconsistent with, and did not impede proper performance of her official duties, a large portion of which consisted of setting up and administering a technical assistance library of materials dealing with integration of the public schools. In fact, from January 11, 1965, until December 21, 1965, Miss Holden performed the duties assigned to her without complaint from her supervisor, and indeed, virtually without supervision. Specifically, prior to December 21, 1965, there was no indication that Miss Holden's work was unsatisfactory or her performance defective in any manner. Moreover, contrary to the applicable regulations, she

was given no formal rating whatsoever and she was not counselled by her supervisor as to any defect in the quality of her work (Plaintiff's Statement of Material Facts, Pars. 4-6, 11, J.A. pp. 21-23).

Nevertheless, during this period, Miss Holden, together with other members of the staff of the Equal Educational Opportunities Program (EEOP), was the object of what she believes to have been a pattern of attempts on the part of her supervisor, David Seeley, to discourage and eliminate (1) EEOP staff participation in outside civil rights activities, and association with outside civil rights groups, and (2) expressions of views by EEOP staff members during office hours differing from views publicly expressed by David Seeley, with particular reference to the proper role of EEOP in effecting public school integration (Plaintiff's Statement of Material Facts, Pars. 9, 12, J.A. p. 22-23).

On December 21, 1965, Miss Holden was abruptly summoned to the presence of David Seeley, and informed by him that she would be dismissed from federal service prior to the expiration of her one-year probationary period. On December 23, 1965, David Seeley requested the Director of Personnel to effect Miss Holden's dismissal on the grounds of (1) unwillingness or inability

to accept direction, (2) inability to cooperate with other staff members, and (3) interference of her civil rights views with her work assignments (Exhibit A-5 to Defendants' Motion for Summary Judgment).

On December 28, 1965, Miss Holden was dismissed from federal service, effective January 7, 1966. The notice of dismissal was in letter form, signed by David Seeley, and approved by the Director of Personnel. The letter set forth three grounds of dismissal: (1) "failure to accept direction without resentment and bad grace," (2) "failure to cooperate with other staff members in gathering information from files assigned to your charge," and (3) "failure to use sound judgment in handling inquiries and proposals assigned to you for staff work" (Exhibit A-7 to Defendants' Motion for Summary Judgment). Significantly, this notice of dismissal had been purged of any reference to Miss Holden's views on civil rights matters. In fact, however, Miss Holden's views on civil rights, and her outside activities in the civil rights field, were the underlying and moving causes of her dismissal. Miss Holden was not dismissed for the reasons stated in the notice of December 28, 1965, nor were the facts asserted therein true or correct (Complaint,

Pars. V, VII, VIII, X. Plaintiff's Statement of Material Facts, Pars. 2, 9, 12, 16 and 22, J.A. pp. 5-7, 20-27). 1/

Miss Holden's efforts to seek review and reversal of her dismissal within the Department of Health, Education and Welfare (HEW) were without result. Thereafter, on January 17, 1966, she initiated timely appeal to the Civil Service Commission pursuant to the Federal Personnel Manual, Chapter 315, Paragraph 8-4a(5) (Exhibit C, p. 3, to Defendants' Motion for Summary Judgment). In her appeal to the Commission, Miss Holden asserted that her dismissal was improper and unlawful because (1) it was not in accordance with Civil Service or agency regulations governing probationary employees, (2) it was based on political reasons not required by statute, and (3) it was in derogation of her attempted exercise of the First Amendment rights of free speech and association (Exhibits B-1, B-8 and B-10 to Defendants' Motion for Summary Judgment; Plaintiff's Statement of Material Facts, Pars. 19 and 21, J.A. pp. 25-27).

Miss Holden's appeal was rejected by the Appeals Examining Office on May 6, 1966, on the grounds that she had not alleged facts which, if true, would sustain a

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1/ On January 6, 1966, 17 EEOP staff members signed a statement attesting to Miss Holden's cooperativeness, hard work, knowledge of her field and sound professional judgment (Exhibit A-14 to Defendants' Motion for Summary Judgment).

conclusion that she had been dismissed for "political reasons not required by statute," 5 C.F.R. §315.806(b). No reference was made to her allegations of improper procedure in connection with her dismissal, or to her assertion that she had been dismissed as a result of her attempted exercise of First Amendment rights. No findings of fact were made. Her appeal was in effect dismissed on jurisdictional grounds (Exhibit A-22 to Defendants' Motion for Summary Judgment).

Miss Holden prosecuted a further appeal to the Civil Service Commission, Board of Appeals and Review. On August 31, 1966, this further appeal was also denied on the grounds that (1) the procedural requirements for dismissal of a probationary employee had been complied with, and (2) the facts alleged by Miss Holden, if true, would not constitute dismissal for "political reasons not required by statute." In so ruling, the Board of Appeals and Review held that 5 C.F.R. §315.806(b) applied only to "reward or reprisal based upon political influences, specifically as resulting from affiliation with or support of recognized parties or political parties, their candidates for public office, or their political campaign activities." The Board made no findings of fact, but dismissed the appeal on jurisdictional grounds.

The Board made no reference to Miss Holden's assertion that she had been dismissed as a result of her attempted exercise of First Amendment rightss (Exhibit A-23 to Defendants' Motion for Summary Judgment). Miss Holden had no further administrative remedy at this point.

On November 9, 1967, she brought this suit. In her complaint, she asserted (1) that her dismissal was unlawful because of the Government's failure to comply with its own regulations governing probationary employees; (2) that her dismissal was unlawful under 5 U.S.C. §7324(b) because it was based on her expression of political views, and (3) that her dismissal was unlawful because it was based on her attempt to exercise the rights of speech and association guaranteed to her by the First Amendment (Complaint, Pars. X and XI, J.A. pp. 8-11).

The Government and Miss Holden filed cross motions for summary judgment on March 20, 1969, and May 8, 1969, respectively. On August 1, 1969, the District Court entered an order granting the Government's motion for summary judgment and dismissing the action, without opinion (J.A. p. 28). From that order this appeal is taken.

STATEMENT OF POINTS

I. ANNA HOLDEN'S DISMISSAL IS INVALID BECAUSE THE GOVERNMENT FAILED TO FOLLOW ITS OWN REGULATIONS GOVERNING THE SUPERVISION, COUNSELLING AND EVALUATION OF PROBATIONARY EMPLOYEES.

A. The Department of Health, Education and Welfare Failed to Follow the Clear Program Established by Regulation for the Supervision, Counselling and Evaluation of its Probationary Employees.

1. HEW did not Provide the Supervision Required by the Regulations.

2. Anna Holden was not Counselled as to her Alleged Shortcomings.

3. Anna Holden was not Given the Formal Performance Evaluation to which she Was Entitled.

B. Anna Holden's Summary Dismissal, as Part of a Systematic Violation of the Probationary Program was Improper and Invalid.

1. The Summary Dismissal Procedures Cannot Be Justified Except as an Integral Part Of the Probationary Program.

2. Anna Holden's Summary Dismissal, Following a Systematic Violation of the Probationary Program Requirements by HEW was Invalid.

II. HEW'S DISMISSAL OF ANNA HOLDEN BECAUSE OF HER CIVIL RIGHTS OPINIONS AND AFFILIATIONS VIOLATED THE CIVIL SERVICE REGULATIONS, THE STATUTES, AND THE CONSTITUTION OF THE UNITED STATES, AND MUST BE DECLARED INVALID.

A. Anna Holden's Dismissal from Federal Employment was Based on her Civil Rights Opinions And Affiliations.

B. The Applicable Regulations, Statutes, and The Constitution of the United States Prohibit Anna Holden's Dismissal from Federal Employment as the Result of her Expressions of Opinion on Public School Desegregation and Her Affiliation with Civil Rights Organizations.

1. The Civil Service Regulations Prohibit Termination of Probationary Employment as A Result of Expressions of Opinion on the Desegregation of Public Schools and Affiliations with Civil Rights Activists.

2. The Hatch Act Prohibits Termination of Probationary Employment for the Activities Engaged in by Anna Holden.

3. Anna Holden's Dismissal as a Result of Her Opinions on and Affiliations with Civil Rights Activists is in Violation Of the Rights Guaranteed to her by the First Amendment to the United States Constitution and is Therefore Invalid.

ARGUMENT

I. ANNA HOLDEN'S DISMISSAL IS INVALID BECAUSE THE GOVERNMENT FAILED TO FOLLOW ITS OWN REGULATIONS GOVERNING THE SUPERVISION, COUNSELLING AND EVALUATION OF PROBATIONARY EMPLOYEES.

A. The Department of Health, Education and Welfare Failed to Follow the Clear Program Established by Regulation for the Supervision, Counselling and Evaluation of its Probationary Employees.

The utilization of a probationary period in the making of appointments to the federal service is authorized by statute, 5 U.S.C. §3321. By regulation pursuant thereto, the Civil Service Commission has established a probationary period of one year, 5 C.F.R. §315.801, which may be extended by the Commission to "protect or promote the efficiency of the Government" 5 C.F.R. §5.1(b). Regulations pertaining to this probationary period have been promulgated by the Civil Service Commission and by the various individual federal agencies, including the Department of Health, Education and Welfare.

The regulations of the Civil Service Commission are set forth in Title 5 C.F.R., Chapter 1, Part 315, Subpart H, §315.801-807, and in the Federal Personnel Manual (Exhibit C to the Defendants' Motion for Summary

Judgment). The supplemental requirements of the Department of Health, Education and Welfare are set forth in a Personnel Guide for Supervisors (Exhibit A to the Plaintiff's Motion for Summary Judgment). Together, these regulations establish a comprehensive program for the supervision, counselling, evaluation and retention or dismissal of probationary employees. In Miss Holden's case, virtually every one of these requirements was ignored.

1. HEW did not Provide the Supervision Required by the Regulations.

According to Civil Service regulations, the probationary period is to be used by the agency to determine the fitness of an employee for continued employment. 5 C.F.R. §315.803. Close, day-to-day supervision is one of the essential elements of the probationary period as required by the Civil Service Commission.

Specifically, the Federal Personnel Manual, Chapter 315, Paragraph 8-3, places the burden of guiding a probationer squarely on the shoulders of the supervisor:

> "During the probationary period, the supervisor should take the following action:
>
> "(1) He should observe the employee's conduct, general character traits, and performance closely.

"(2) He should try to understand problems and give him proper guidance.

* * * "

Civil Service regulations are further supplemented by individual agency regulations. In the case of the Department of Health, Education and Welfare, these take the form of the "Personnel Guide for Supervisors." The HEW Personnel Guide explains the supervisor's duty in more detail. Chapter IV, Guide 9, page 2, makes the supervisor responsible for day-to-day communication with an employee with respect to his strengths and weaknesses.

> "In your day-to-day working relations you have many opportunities to keep an employee informed of his strengths and weaknesses. ... Discuss shortcomings with an employee in a spirit of helpfulness rather than direct criticism. Include suggestions for his improvement. Aid him in his development. ... "

And, most importantly, with specific reference to probationary employees, Chapter V, Guide 1, page 1, admonishes supervisors to provide a "full and fair trial," and explains what this means in terms of supervision:

> "You must, however, give him a full and fair trial. To do this, fully orient him regarding the probationary period and your part in it,

> his place in the organization and its mission, his own job requirements, the conditions of his employment and the facilities available. ... Also, plan his assignments carefully. Make sure he knows how he is doing in relation to what is expected of him. Assist him to improve as necessary. ... "

During Anna Holden's probationary trial period all of the requirements established by the Civil Service Commission and the Department of Health, Education and Welfare were ignored. Her supervisor throughout the period was David Seeley, according to his own certification (Exhibit A-6 to Defendants' Motion for Summary Judgment). Yet, Mr. Seeley viewed her only from a distance, had little or no day-to-day contact with her, and left her pretty much to her own devices (Plaintiff's Statement of Material Facts, Pars. 4 and 6, J.A. pp. 21-22). She received assignments or requests from a variety of people in her role as organizer of a "clearinghouse" of technical information on school integration (Complaint, Par. V, J.A. p. 5). Mr. Seeley never criticized her work product, her character or her conduct prior to December 21, 1965. His position on outside activities in the cause of civil rights and criticisms of the policy of the agency within the agency's four walls was clear as a result of Mr. Seeley's actions

and reactions (Complaint, Par. VII, Plaintiff's Statement of Material Facts, Pars. 4, 9, 10 and 12, J.A. pp 6, 21-23). But even in this area Mr. Seeley did not counsel, advise or supervise Anna Holden, as required by the regulations. Rather, he acted by indirection -- the quick removal of an outspoken civil rights advocate also employed under Mr. Seeley (Exhibit B-10, p. 4 to the Defendants' Motion for Summary Judgment); the isolation, without work assignments, of another co-worker. (Id, p. 5); indirect comments to other employees about Miss Holden's outside activities. (Id, p. 2); meetings with other supervisors and interviews with job applicants, word of which filtered down to Miss Holden and her co-workers. (Id, pp. 3 and 4).

In short, Anna Holden received no supervision, was never told what was expected of her, never received constructive criticism and was not reasonably informed of any special conditions of her employment.

2. Anna Holden was not Counselled as to Her Alleged Shortcomings.

"Probation" has been variously defined as:

> "Any proceeding designed to ascertain truth, to determine character, qualifications, etc.; examination, trial or a period of trial;" Webster's New International Dictionary, 2d Edition (1938).

An important element of such a period of trial for a federal employee is the counselling by his supervisor from time to time as to his performance in the job. Federal Personnel Manual, Chapter 315, Subpart 8, paragraph 8-3, quoted, supra.

For supervisors in the Department of Health, Education and Welfare, the Personnel Guide for Supervisors defines "proper guidance" with greater precision. Thus, Chapter V, Guide 1, page 1, states that a supervisor must:

> "Make sure he [a probationary employee] knows how he is doing in relation to what is expected of him. Assist him to improve as necessary."

Chapter V, Guide 4, page 2, sets forth a requirement for day-to-day evaluation of performance:

> "Make performance evaluation a part of your day-to-day work activities in order to gain its full value. Discussions with employees is very much a part of the evaluation process. Let employees know what you think of their performance. Discuss it frequently with them. Do this not only at the time of the rating, but also throughout the rating period."

Miss Holden's supervisor, Mr. David Seeley, completely ignored these requirements throughout the 11-month period in 1965 prior to his abrupt issuance of a notice of dismissal. Indeed Mr. Seeley confessed as much

when he wrote to the Director of Personnel, Office of Education, on December 23, 1965, stating in part:

> "I am aware that over the past year the organizational and supervisory arrangements have been a great deal less than satisfactory. Miss Holden might reasonably feel that her performance would have been different under more stable and orderly circumstances. ... " (Exhibit A-5 to the Defendants' Motion for Summary Judgment).

What Mr. Seeley's extraordinary words came down to in hard fact were (1) no supervision whatsoever over much of Miss Holden's trial period; (2) no discussion with Miss Holden of any shortcomings in her work prior to her dismissal; (3) no chance for Miss Holden to improve, if there were such shortcomings; and (4) no guidance as to how she might improve her performance to meet her supervisor's standards (Complaint, Pars. V and XI(a), Plaintiff's Statement of Material Facts, Pars. 2, 7, 6 and 13, J.A. pp 5, 9, 20-24).

3. Anna Holden Was Not Given the Formal Performance Evaluation To Which she was Entitled.

Day-to-day supervision and guidance are ongoing requirements which supervisors are required to meet, under the regulations, during an employee's probationary period. A formal rating at the end of nine

months follows naturally. It forces supervisors to focus on an employee's performance and deficiencies, after a reasonable time for adjustment to the new job. And it gives the employee a reasonable chance to improve his performance, if required, prior to the point at which an agency must normally decide to keep him or discharge him.

The requirement for a formal rating, between the end of the eighth and tenth months, is set forth without qualification or ambiguity in the Federal Personnel Manual, Chapter 315, Subchapter 8, Paragraph 8.3:

> "The supervisor of each employee serving a probationary period must, no earlier than the beginning of the 9th month nor later than the end of the 10th month of such period, submit through supervisory channels a signed statement certifying either that the employee's performance, conduct and general traits of character have been found satisfactory or that they have been found unsatisfactory. Each certification must contain a positive recommendation whether the employee should be retained beyond the probationary period. ... No portion of this paragraph is to be interpreted as preventing or discouraging the initiation of removal action in accordance with paragraph (4) above, at any time during the probationary period."

This requirement for a formal performance evaluation is then carried directly into the HEW regulations, the Personnel Guide for Supervisors. However, a

significant addition is made: the evaluation must be discussed with the probationary employee. Thus, Chapter V, Guide 1, pages 1-2, instructs the supervisor that:

> "At the end of the ninth month of the probationary or trial period your personnel office or administration office will provide forms and ask you to make a full written report. ...
>
> "Discuss this report with the employee, then send it through the channels required by your part of the Department."

Of course, that instruction is qualified so as to allow the supervisor to act unfavorably prior to the rating period:

> "If you conclude at any time in the probationary or trial period that an employee will need to be separated in spite of efforts which you may make to assist him to measure up, do not put off such action until the nine month's rating is due. ..."

But under no circumstances may a supervisor validly ignore the rating period.

In Miss Holden's case, her supervisor, David Seeley, totally disregarded the requirement for a formal nine-month's performance rating (Plaintiff's Statement of Material Facts, Par. 5, J.A. p. 21). The absence of such a rating and the failure to discuss it are even more damaging in Anna Holden's case where

she never received any prior guidance or supervision. Perhaps had Mr. Seeley made his complaints known even at this late date, Miss Holden could have corrected alleged mistakes. Mr. Seeley's written evaluation is dated December 27, 1965 (Exhibit A-6 to Defendants' Motion for Summary Judgment). This was certainly too late to allow for any corrective action by Anna Holden within the probationary period. But even here, Mr. Seeley ignored the specific requirement of discussing this rating with Miss Holden before sending it through channels.

Thus, Miss Holden's eleven and one-half month "trial period" as a federal employee can only be characterized as a period of systematic violation by her supervisor of every important procedural requirement designed to make that trial period meaningful. First, she was not supervised at all for much of the time. Second, she was never counselled as to alleged shortcomings and never advised how to improve her performance, if indeed such improvement was necessary. And, third, she was never formally evaluated until after the decision to fire her had been made and communicated to her.

B. Anna Holden's Summary Dismissal, as Part of a Systematic Violation of the Probationary Program was Improper and Invalid.

1. The Summary Dismissal Procedures Cannot Be Justified Except as an Integral Part of the Probationary Program.

Summary dismissal from Government competitive service is limited to the probationary period. Once that period has passed, an employee becomes entitled automatically to a range of procedures designed to assure fairness. See 5 C.F.R. §752.201, et seq. Thus, the harsh remedy of summary dismissal must be viewed as an integral part of the probationary system as a whole. If such were not the case, it would be difficult to justify the creation of a separate group of Government employees in the competitive service with distinctly second-class procedural status. Indeed, the creation of such a class would itself raise substantial Constitutional questions. Cf. Wieman v. Updegraff, 344 U.S. 183, 192 (1952); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1454-57 (1968).

The criterion applied in summary dismissal, moreover, is extremely -- perhaps unacceptably -- vague, unless the dismissal procedure is viewed as part of the probationary program as a whole. The criterion stated in

the regulations is fitness "for satisfactory service." Federal Personnel Manual, Chapter 315, Subchapter 8, Paragraph 8-3a(4). This criterion leaves much to the imagination. Clearly, it does not provide any guidance whatsoever to an employee subject to it. Unless it is fleshed out for an employee by the actual procedures of close supervision, counselling and evaluation, an employee would almost invariably be taken by surprise when it was suddenly applied to him at the end of his probationary term. He would clearly be confused, as Anna Holden was, as to what the standards of appropriate conduct were. This Court has only recently considered the serious impact of such a situation, and has indicated that such vagueness may be constitutionally intolerable in the context of federal employment. Goldwasser v. Brown, U.S. App. D.C. No. 22253, September 17, 1969. Cf. Carter v. United States, U.S. App. D.C. No. 20694, 407 F.2d 1238 (D.C. Cir 1968).

Instead, however, summary dismissal is clearly just one element of a probationary system that, viewed as a whole, avoids these pitfalls. That system starts with constant supervision, and proceeds through day-to-day counselling to the point of a formal evaluation of each probationary employee, and ultimately to a

decision as to whether he is or is not fit for continued Government employment. As part of such a carefully prescribed system of evaluation and counselling, summary dismissal can be justified both as being less harsh on the employee than it might otherwise appear to be, and as a necessary tool for the administration of a workable Civil Service system.

The regulations make it clear that summary dismissal can only be utilized by the Government after a "full and fair trial," the essential elements of which have already been discussed at length. Thus, the Federal Personnel Manual, Chapter 315, Subchapter 8, Paragraph 8-3a(4), states that:

> "If it becomes apparent, after full and fair trial, that the employee's conduct, general character traits, or capacity are not such as to fit him for satisfactory service, the supervisor must initiate action to separate the employee."

Paragraph 8-4 repeats the admonition twice:

> "If the appointee fails to demonstrate these characteristics after full and fair trial, his separation for disqualification is proper. ... Obviously, a decision to terminate should not be made in haste or until the employee has had a full and fair trial."

Only after this requirement has been met is summary dismissal permitted by the regulations. At

that point, the regulations require only that (1) the employee be notified in writing that he is being discharged, and (2) the notification include the agency's conclusions as to the inadequacies of the employee's conduct or performance. Federal Personnel Manual, Chapter 315, Subchapter 8, Paragraph 8-4a(3).

2. Anna Holden's Summary Dismissal, Following A Systematic Violation of the Probationary Program Requirements by HEW was Invalid.

It has long been established that agencies of the federal Government are bound by their own regulations; that actions taken in violation thereof are invalid; and that employee dismissals not in compliance with regulations are among the Government actions that will be so invalidated.

Thus, in Vitarelli v. Seaton, 359 U.S. 535 (1959), the Secretary of the Interior dismissed an employee on security grounds. Once having chosen that procedural route, the Secretary was held to be obligated to conform to the procedural standards he had formulated for security dismissals, and his failure to follow those regulations, as found by the Court, resulted in a ruling that the dismissal was illegal and of no force and effect. In a concurring opinion, Justice Frankfurter stated:

> "This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword." 359 U.S. at 547.

In Vitarelli, the regulations involved were included in a Department of the Interior Order, No. 2738. Other cases have applied the same rule where a variety of different regulations, manuals and procedures are involved including: Library of Congress General Orders, Semaan v. Munford, 118 U.S. App. D.C. 282, 335 F.2d 704 (D.C. Cir. 1964); Navy Civilian Personnel Instructions, Bennett v. United States, 174 Ct.Cl. 492, 356 F.2d 525, vacated on other grounds, 385 U.S. 4 (1966); Army Civilian Personnel Instructions, Madison v. United States, 174 Ct. Cl. 985 (1966), cert. den., 386 U.S. 1037 (1967); and Air Force Manuals, Greenway v. United States, 163 Ct.Cl. 72 (1963).

Moreover, it is clear that the rule of the "procedural sword" is equally applicable in the case of probationary employees. Thus, in Cohen v. United States, 384 F.2d 1001 (Ct.Cl. 1967), a Post Office employee was discharged during his probationary period for reasons of physical disability. The Court of Claims upheld the discharge only after examining in considerable detail whether the employee had been accorded the procedural rights established by Civil Service regulations. Similarly, Bennett

v. United States, supra, involved the discharge of a probationary employee. Again, the Court of Claims sustained the dismissal only after a detailed review of the adequacy of the administrative proceedings to determine whether Civil Service and agency regulations had been complied with. Thus, the Court stated in part:

> "However, both the Civil Service Commission and the Navy had promulgated regulations respecting the discharge of probationary employees and it is not open to question that her discharge was invalid if it was not effected in compliance with such regulations." 356 F.2d at 527.

Similarly, in Greenway v. United States, supra, a probationary employee was dismissed on grounds of inadequate performance. And again, the Court of Claims examined closely whether he had been accorded the procedural rights established by Civil Service and agency regulations. Moreover, the Court went well beyond an examination of the procedures immediately surrounding the dismissal. It examined, for example, Greenway's allegations that he had not received the indoctrination, guidance and evaluation required by regulations, and that as a result he had been denied the "full and fair trial" which was prescribed for probationary employees. Indeed, the trial commissioner, later affirmed by the Court, ruled that these and similar assertions raised

questions of fact, and that a summary judgment for the Government would be improper, 163 Ct.Cl. at 83-84. After trial of these issues, the Court of Claims upheld the dismissal on the grounds that Greenway had failed to prove his allegations, and that the regulations requiring a "full and fair trial" had been substantially complied with, 175 Ct.Cl. 350, 359-61, cert. den., 385 U.S. 881 (1966). See also Daub v. United States, 154 Ct.Cl. 434, 437-38 (1961), 292 F.2d 895, 897-98; Watson v. United States, 142 Ct.Cl. 749 162 F.Supp. 755, 757-59 (1958). Cf. Service v. Dulles, 354 U.S. 363 (1957).

The same principle was most recently applied by the United States District Court for the District of Columbia in Donovan v. United States, 298 F.Supp. 674 (D.D.C. 1969). There, an employee of the Federal Aviation Administration was discharged during his probationary period on grounds of lack of certain skills including writing. There was no question that the Government had complied with the procedural requirements immediately surrounding the dismissal. However, Donovan asserted, as does Miss Holden in this case, that he had not been accorded the supervision, guidance and evaluation that Civil Service and agency regulations required,

although the question of the nine-months' formal performance evaluation did not arise. On cross motions for summary judgment, the District Court granted the plaintiff's motion and ordered judgment in his favor, including reinstatement and back pay. The District Court stated, in relevant part:

> "There is no dispute over the procedural propriety of his dismissal after this point. Rather, plaintiff argues that the agency failed initially to follow its regulations providing for the supervision and training of employees and that in denying him these rights, it acted capriciously and arbitrarily. The decision of his supervisors to discharge rather than to train him, he argues, was not lawful for the reason that it was in violation of the agency's regulations. The Court agrees.

The Court then went on to quote from the FAA's Handbook of guidelines for supervisors. This Handbook sets forth requirements for supervisors and counselling that are strikingly similar to HEW's. The Court stated unequivocably that the FAA guidelines were required to be followed by the agency:

> "[1] The language of these guidelines is commanding; their formulation official. There can be no doubt from their face and from the legislative history of the authority upon which they are predicated that they are mandatory. Under Thorpe v. Housing Authority, 89 S.Ct. 518, they must be followed.

The Court then discussed the plaintiff's allegations -- that he had not been given supervision; that his supervisor was frequently absent; and that he was not given adequate training and guidance. And the Court went on:

> "The Government argues that all procedural rights were accorded the plaintiff and that for the Court to inquire further would constitute an improper imposition on the agency officials of the Court's judgment as to the plaintiff's job qualifications. Generally the Court agrees.
>
> "[2] The Government draws from this, however, the conclusion that where an employee is discharged during the probationary period for the announced reason that he lacks basic skills, the discharge cannot be arbitrary and capricious and cannot be reviewed. The error in this conclusion is that the agency has materially qualified its position by ordering that supervisors will follow particular procedures in the training and assistance of employees on new assignments. These procedures must be followed and may be reviewed by the Court. An administrator may not pick and choose among those regulations he is instructed to follow. If a discharge is effected without strict observance of applicable regulations, that discharge is unlawful." 298 F.Supp. at 676-77. (Footnotes omitted.)

Thus, a Court must inquire into whether the agency has observed its own rules in the supervision and counselling of a probationary employee leading to

dismissal, and if those rules have not been followed the agency action must be held invalid. The uncontroverted facts as set forth in Plaintiff's Statement of Material Facts clearly establish that Anna Holden did not receive the supervision, guidance, instruction, constructive criticism, evaluation and opportunity to correct alleged deficiencies required by HEW's own regulations. Her dismissal must therefore be held invalid.

II. HEW'S DISMISSAL OF ANNA HOLDEN BECAUSE OF HER CIVIL RIGHTS OPINIONS AND AFFILIATIONS VIOLATED THE CIVIL SERVICE REGULATIONS, THE STATUTES, AND THE CONSTITUTION OF THE UNITED STATES, AND MUST BE DECLARED INVALID.

A. Anna Holden's Dismissal from Federal Employment Was Based on her Civil Rights Opinions and Affiliations.

Earlier we have dealt with the failure of Anna Holden's supervisor to follow HEW's own regulations concerning the supervision, guidance, and evaluation of its employees. We have argued, we believe conclusively, that Anna Holden's dismissal was invalid because it was procedurally defective and HEW is bound to observe its stated procedures, especially in this case where a failure to do so would create problems of constitutional dimension. Now we turn to what would have happened had Anna Holden's supervisor, David Seeley, supervised, counselled, guided and evaluated her in accordance with the HEW regulations.

Had David Seeley continuously supervised Miss Holden, he would have concluded that all of her personal characteristics, traits and attributes were such as to eminently qualify her for the job that she was doing, with perhaps the sole exception that her expressed opinions on civil rights matters and affiliations with civil rights organizations did not fit his image of EEOP in

the latter half of 1965 (Complaint, Pars. IV and V, J.A. pp. 4-5). Seeley, of course, knew this from the outset of Miss Holden's probationary period (Plaintiff's Statement of Material Facts, Par. 1, J.A. p. 20). Still, she was given her job in early 1965. At some time during that year Mr. Seeley's concept of acceptable attitudes and affiliations of employees in the Equal Educational Opportunities Program which he directed must have changed. Thus, Mr. Seeley sought to cut off EEOP staff members affiliations with civil rights groups and activities and to inhibit staff discussion of the proper role of EEOP in desegregating the public school system (Plaintiff's Statement of Material Facts, Pars. 9 and 12, J.A. pp. 22-23). Without taking Mr. Seeley's deposition, as Miss Holden requested in the District Court, the reasons for his 180-degree turn on civil rights activity and affiliation remain veiled. However, this Court can take judicial notice of the fact that in the Fall of 1965 the Office of Education announced the cut-off of federal funds to Cook County, Illinois, schools because of segregation found by EEOP, and that that determination was quickly reversed and the funds released as a result of the political process. These turn-abouts are not

uncommon in Government; especially the federal Government. The policies of yesterday are not the policies of today and the Executive must always be free to act and respond to new situations and new pressures. It is precisely for this reason, however, that Civil Service employees, including those undergoing a probationary period, are protected from dismissal for political reasons.

Accordingly, if Seely had provided guidance and supervision to Anna Holden, in all probability he would have told her in late summer of 1965, "Anna, you were good in the beginning, but at the present time, you're just too hot for us to handle." Later, he would have warned her that " .. unless you disassociate yourself from CORE and its activists, we cannot afford to have you here any more." And finally, in evaluating Anna Holden and telling her of her impending dismissal, he would have frankly said, "Anna, your civil rights activism makes you more of a liability than an asset to us."

The complaint filed in the District Court alleged that Anna Holden was dismissed as a result of her expressions of opinion on the need for forceful action to desegregate the American public schools and her affiliation with, and leading role in, the activities of

CORE (Complaint, Par. X, J.A. pp 8-9). The same conclusion was stated in the Plaintiff's Statement of Material Facts in the District Court (Pars. 13, 16 and 22, J.A. pp. 23-27). The Government filed no Statement of Genuine Issues with regard to any of these Stated Material Facts and as a result they must be deemed to be admitted for purposes of the resolution of the case here. Thus, we start with a simple statement: Anna Holden's dismissal resulted from her expression of opinion on segregation in the public schools and as a result of her affiliation with civil rights activities and organizations. Which leads to a simple question: Could David Seeley validly dismiss her for such activities or affiliations? The applicable regulations and statutes, as well as the Constitution of the United States, all proclaim that dismissal on such grounds can not be tolerated.

B. The Applicable Regulations, Statutes and the Constitution of the United States Prohibit Anna Holden's Dismissal from Federal Employment as the Result of Her Expressions of Opinion on Public School Desegregation and Her Affiliation with Civil Rights Organizations.

1. The Civil Service Regulations Prohibit Termination of Probationary Employment As a Result of Expressions of Opinion on The Desegregation of Public Schools and Affiliations with Civil Rights Activists.

Within the Civil Service system "equal opportunity" is an issue of overriding importance and is not to be taken lightly. Part 713, Civil Service Regulations, is entitled "Equal Opportunity," and deals with those principles held to be basic not only to the industrial relations of our Government, but to the very foundations of our Government as well. Thus, equal opportunity is guaranteed without regard to race, color, religion, sex, national origin, politics, marital status, or physical handicap. Specifically subpart D of part 713 deals with equal opportunity without regard to politics, marital status, or physical handicap, and provides with particular regard to probationary employees that

> " ... an agency may not ... effect the termination of a probationer under Part 315 of this chapter, (1) for political reasons, except when required by statute, ... "

A remedy is afforded the probationer for vindication of this right within the regulations themselves. Section 315.806(b) provides in applicable part that

> " ... an employee whose termination is subject to the provisions of Section 315.804 or Section 315.805 may appeal on the ground that the action taken was based on political reasons not required by statute."

The Commission, in this case, held that a remedy before the Civil Service Commission was not available. The Commission incorrectly interpreted its own jurisdiction to encompass only "partisan political discrimination." Thus, while the Commission acknowledged that Anna Holden's activities involved engaging in "programs seeking to influence the formulation of public policy, and to promote political action, in the area of civil rights," (Exhibit A-23 to Defendants' Motion for Summary Judgment), it still refused to consider her appeal.

It is submitted that this decision of the Civil Service Commission was erroneous. It is axiomatic that the regulation must be interpreted so as to conform to the boundaries of the statute that gave it life and that statute, in turn, should be interpreted so as to be consistent with the Constitution of the United States. The arguments which follow will establish that the statute protects against dismissal on the basis of the activities engaged in by Anna Holden, and that the statute in so doing is only in furtherance of an already existing Constitutional right.

If this be the case, the Commission's interpretation of the regulation designed to provide an administrative remedy for that right must be in error.

2. The Hatch Act Prohibits Termination of Probationary Employment for the Activities Engaged in by Anna Holden.

In 1939 Congress passed the Hatch Act. Act of August 2, 1939, 53 Stat. 1147, 5 U.S.C. §7324. This Act, designed to regulate political activities of employees in the Executive Branch of the federal Government, had a two-fold congressional purpose: (1) to protect the tenure of Government employees by taking political activity out of the employment, promotion, and dismissal of Government employees; and (2) to take Government employees out of political activity. United Federal Workers of America v. Mitchell, 56 F.Supp. 621 (D.D.C.) aff'd. 330 U.S. 75 (1944).

The Act guarantees that a federal employee "retains the right to vote as he chooses and to express his opinion on political subjects and candidates." 5 U.S.C. §7324(b). This is a far broader concept than that involved in "partisan political discrimination." Since the Civil Service regulation phrase "political reason" is intended to afford a remedy for enforcement of the right granted by the statute itself, it cannot be reasonably interpreted to be limited to appeals based upon "partisan political considerations." Instead, it must involve the thing admittedly at issue here -- activities and affiliations

with "programs seeking to influence the formulation of public policy, and to promote political action, in the area of civil rights."

It is accepted law in this Circuit that the Act protecting federal employees' right to express their opinions on all political subjects is not limited to political expression endorsed specifically by one of the major parties. Thus, it has been recognized that the Act would provide an employee the right to express his anti-war opinions and to conduct himself in conformance with those opinions prior to World War II, even where those opinions were not considered a plank of either major political party. Friedman v. Schwellenback, 65 F.Supp. 254 (D.D.C. 1946), aff'd 81 U.S. App. D.C. 365, 159 F.2d 22 (D.C.Cir.), cert. den., 67 S.Ct. 979 (1947).

3. Anna Holden's Dismissal as a Result of Her Opinions on and Affiliations With Civil Rights Activists is in Violation of the Rights Guaranteed to her by the First Amendment to the United States Constitution And is Therefore Invalid.

Government employees cannot be impelled as a condition of employment to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest. Pickering v. Board of Education, 391 U.S. 563 (1968). The Government has admitted that "the organizational activities and affiliation supporting Miss Holden's complaint of political

discrimination may be recognized as engaged in programs seeking to influence the formulation of public policy, and to promote political action. ..." (Exhibit A-23 to Defendants' Motion for Summary Judgment). Certainly Miss Holden's interpretation of the proper role of the Executive in furtherance of the legislative and judicial mandates to speed desegregation in the public schools could not be conceived of as those of a fanatic, nor could they be determined to be willfully or maliciously directed against her employer, nor for that matter, could they even be considered erroneous. At best, they could be considered controversial and as it turned out, Miss Holden would have been on the winning side of the controversy had she been allowed to keep her job.

It is universally recognized that even those in the position of applicants for employment, as well as those conditionally employed pending satisfactory completion of a probationary period, are constitutionally protected from arbitrary or discriminatory treatment by the Government. Scott v. Macy, 121 U.S. App. D.C. 205, 349 F.2d 182 (D.C. Cir. 1965). Thus, people may not be excluded from federal office because they are Republicans, Jews, or Negroes. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947). Likewise,

they may not be excluded from Government employment solely on the basis of membership in certain political organizations. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Wieman v. Updegraff, 344 U.S. 183, 192 (1952). They may not be barred from office because of their religious beliefs or disbeliefs, Torcaso v. Watkins, 367 U.S. 488, 495 (1961). They may not be forced to surrender their freedom of speech, including freedom to criticize the policy decisions of their superiors as a condition of continuing in their job, Pickering v. Board of Education, supra; Meehan v. Macy, 129 U.S. App. D.C. 217, 392 F.2d 822, 832 (D.C. Cir. 1968). Nor can they be dismissed, even if they are probationary employees, because of their affiliation with political activities on behalf of civil rights groups seeking an end to racial discrimination, Rosenfield v. Malcolm, 65 Cal.2d 559, 421 P.2d 697 (1967); see Shelton v. Tucker, 364 U.S. 479 (1960). Not even in Mississippi. Tristan v. University of Mississippi, C.A. 5, October 9, 1969, 38 U.S. Law Week, 2257.

There may be some instances in which some restraints on rights ordinarily protected by the First Amendment can be justified with regard to a public servant. Thus, both Pickering and this Circuit's opinion in

Meehan recognize that there is a subtle balancing of interests -- of the employee as a citizen in commenting on public interests and of the Government as an employer in promoting efficient operations and proper performance of duty. The Government, however, rejects any such balancing in this case. It refuses to defend in any way its conduct as it impinged upon Miss Holden's First Amendment rights. The Government's position is that Miss Holden was terminated allegedly in procedural accord with the applicable regulations and that there is nothing more to say. Obviously, this cannot be the case if, as Anna Holden has claimed, and the Government has failed to dispute, she was in reality dismissed for her civil rights' activities and affiliations.

Obviously, the discharge notice cannot be considered conclusive. The fact that the notice itself may state a valid reason for discharge cannot preclude an investigation into the real reason for the dismissal. To accept the Government's argument that further probing is precluded is to license arbitrariness. The substantive right cannot be protected in the absence of a procedure for ascertaining whether or not it has been infringed:

> "Manifestly, however, those rights [First Amendment and freedom of association, in particular] can be effectively

> destroyed if the agency can oust her without any procedure suitable to guard against the likelihood that its decision is in fact based upon antagonism to her exercise of first amendment rights. Thus, it may be fair to say that the first amendment itself can impose a duty of procedural due process upon those otherwise bound by its provisions, and can establish a right to procedural due process for those whom its provisions are substantively intended to protect." Van Alstyne, The Demise of the Right - Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1453 (1968).

The Government has in effect admitted that Anna Holden's expressions of opinion and affiliations regarding desegregation of the public school system lie at the root of her dismissal. Unless the Government was willing to prove that these opinions and affiliations made it impossible for Anna Holden to perform satisfactorily her duties as a federal employee (an unlikely possibility, since they had not disqualified her at the outset of her employment), her dismissal cannot be upheld. This the Government has not seen fit to do, and in fact, by preventing the deposing of David Seeley, has consistently and forcefully avoided testimony on this question, while at the same time raising no genuine issue as to Anna Holden's statements of fitness for her federal position.

CONCLUSION

Based on the foregoing, we respectfully request that the Court:

(1) Reverse the Order of the District Court granting the Government's Motion for Summary Judgment;

(2) Enter an Order for the Appellant, Anna Holden

(a) Declaring her dismissal from federal employment invalid,

(b) Requiring her immediate reinstatement to her former position with all the rights and privileges with regard to status, pay grade and time in service that would have accrued to her had she not been unlawfully dismissed,

(c) Awarding her back pay in an amount sufficient to cover the amount she would have been paid between her unlawful dismissal and her reinstatement, and

(d) Such other relief as is deemed necessary and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have personally served the foregoing Brief for Appellant on Appellees' attorneys at the Office of the United States Attorney for the District of Columbia, Washington, D.C.

Robert H. Turtle

Robert H. Turtle

November 14, 1969

STATUTES, RULES AND REGULATIONS INVOLVED

United States Code, Title 5 §3321

> "The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute."

United States Code, Title 5 §7324(b)

> "(b) An employee to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates."

Code of Federal Regulations, Title 5 §315.803

> "The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment."

Federal Personnel Manual, Chapter 315, Subchapter 8, Paragraph 8-1, Exhibit C to Defendants' Motion for Summary Judgment

> "The Commission regards the probationary period described in this subchapter as a final and highly significant step in the examining process. It provides the final indispensable test, that of actual performance on the job, which no preliminary testing methods can approach in validity. During the probationary period, the employee's conduct and performance in the actual duties of his position may be observed, and he may be separated from the service without undue formality if circumstances so warrant. ...
>
> "Properly used, the probationary period affords an opportunity for fostering the interest of the probationer as well as of the service. ... Intelligent and considerate

ADDENDUM

treatment during the probationary period will often have a lasting effect on the career of the employee, and will often save for useful and efficient Federal service employees who would otherwise be separated, or retained in positions in which they have little prospect of success."

Federal Personnel Manual, Chapter 315, Subchapter 8, Paragraph 8-3

"During the probationary period, the supervisor should take the following action:

"(1) He should observe the employee's conduct, general character traits, and performance closely.

"(2) He should try to understand problems and give him proper guidance.

"(3) He should study the employee's potentialities closely and try to determine whether he is suited for successful Government work.

"(4) If it becomes apparent, after full and fair trial, that the employee's conduct, general character traits, or capacity are not such as to fit him for satisfactory service, the supervisor must initiate action to separate the employee. ...

* * *

"The supervisor of each employee serving a probationary period must, no earlier than the beginning of the 9th month nor later than the end of the 10th month of such period, submit through supervisory channels a signed statement certifying either that the employee's performance, conduct and general traits of character have been found satisfactory or that they have been found unsatisfactory. Each certification must contain a positive recommendation whether the employee should be retained beyond the probationary period. ... No portion of this paragraph is to be interpreted as preventing or discouraging the initiation of removal action in accordance with paragraph (4) above, at any time during the probationary period."

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CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DATE	PROCEEDINGS
November 9, 1967	Complaint, Appearance
November 9, 1967	Summons, Copies (7)
January 17, 1968	Appearance of John R. Kramer for plaintiff.
January 18, 1968	Stipulation extending time for defendant's answer to February 16, 1968.
February 16, 1968	Answer - appearance of Edwin L. Weisl, Jr. David G. Bress Gil Zimmerman Harland F. Leathers Robert D. Bernstein
February 16, 1968	Calendared (N) AC/N
May 2, 1968	Notice of plaintiff to take deposition of David Seeley.
May 16, 1968	Motion of defendant for protective order.
May 23, 1968	Opposition of plaintiff to motion for protective order.
June 7, 1968	Recommendation granting defendant's motion for protective order; staying answer to and including August 19, 1968; providing if summary judgment shall be pending as of that date, discovery shall be stayed. Asst. Pretrial Examiner

June 12, 1968	Appearance of John R. Kramer for plaintiff.
August 19, 1968	Stipulation extending time for defendant to file motion for Summary Judgment to 9-18-68.
September 18, 1968	Stipulation extending time for defendant to file motion for Summary Judgment to 10-18-68.
October 11, 1968	Stipulation extending time for defendant to file motion for Summary Judgment to 11-18-68.
October 25, 1968	Called Pretrial Examiner.
November 18, 1968	Stipulation extending time for defendant to file motion for Summary Judgment to 12-18-68.
December 18, 1968	Stipulation extending time for defendant to file motion for Summary Judgment to 1-20-69.
January 22, 1969	Stipulation extending time for defendant to file motion for Summary Judgment to 3-30-69.
March 20, 1969	Motion of defendant for Summary Judgment Statement. P & A Exhibits A, B & C.
April 1, 1969	Stipulation extending time for plaintiff to respond to defendant's motion for Summary Judgment to 4-30-69.
May 8, 1969	Motion of plaintiff for Summary Judgment. P & A Statements (2), Exhibit A, affidavit.
May 8, 1969	Opposition of plaintiff to defendant's motion for Summary Judgment.

June 19, 1969	Oral argument of both motions. Taken under advisement.
August 1, 1969	Judgment granting motion of defendants for Summary Judgment. Plaintiff's application for discovery denied as moot, case recaptioned to substitute proper names for defendants.
August 25, 1969	Notice of Appeal by plaintiff per order of August 1, 1969.
August 25, 1969	Cost bond on appeal of $250 with Tremeless Indemnity Co. Affirmed.
October 3, 1969	Stipulation re exhibits A, B & C to defendants' motion for Summary Judgment filed March 20, 1969.
October 3, 1969	Appearances of Turtle and Johnson.

[FILED November 9, 1967]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTION, AND OTHER RELIEF

* * *

II.

In this action, plaintiff seeks: a declaratory judgment that her dismissal as an employee of the Department of Health, Education and Welfare was unlawful; an injunction ordering her reinstatement; and other relief; on the grounds that her dismissal was in violation of her rights under the First and Fifth Amendments of the Constitution, in violation of the laws of the United States and regulations of the United States Civil Service Commission and the United States Department of Health, Education and Welfare, and in excess of Defendants' authority under law.

* * *

IV.

Plaintiff is an experienced sociologist with a Master of Arts degree from the University of North Carolina (1955), further post-graduate study at the University of Michigan, and 16 years of extensive work experience, publications,

reports, professional affiliations, honors and professional experience in race relations and civil rights, including school desegregation.

V.

On January 11, 1965, Plaintiff was appointed to the position of Education Research and Program Specialist, Grade GS-11, in the Office of Equal Educational Opportunities, the school desegregation program of USOE, HEW. Plaintiff was responsible for searching out and analysing research and educational materials for a clearinghouse of information pertaining to problems and progress of school desegregation, developing a research and materials library for the school desegregation program, preparing articles and reports, providing consultative services based on equal educational materials, and performing other similar duties. At all times while so employed, Plaintiff conducted herself properly and performed all her assigned duties thoroughly, efficiently, honestly, and capably, and worked well and harmoniously with her fellow staff members and supervisors.

VI.

Before her appointment and during all times herein material, Plaintiff was an active member of the Housing Committee of the Washington chapter of the Congress of Racial Equality, CORE, and as such took part in programs of CORE relating to the desegregation of housing in the

Washington, D.C. area, including CORE's public demonstrations of a peaceful nature. These activities were not inconsistent with, and in no way affected, Plaintiff's employment or the work of USOE in which Plaintiff was engaged. Plaintiff believes, and, throughout the year of her employment by USOE, often expressed the view within USOE that USOE should take more affirmative action to desegregate the schools and that Negroes should have equal rights.

VII.

Defendant Gardner, through his agents, resisted Plaintiff's and others' suggestions that USOE should take more affirmative action to desegregate schools, and sought to prevent plaintiff and others from urging changes in USOE's policies. As a result of Plaintiff's activities and expressions and of similar activities and expressions by other staff members of USOE, Defendant Gardner, through his agents, initiated a pattern of intimidating, suppressing and eliminating such staff members from the Office of Education.

VIII.

As a part of the aforementioned pattern and as a result of Plaintiff's active participation in public civil rights demonstrations and otherwise exercising her constitutional rights under the First Amendment,

Defendant Gardner, through his agent and employee, David Seeley, then Acting Director of the Office of Equal Educational Opportunities, told Plaintiff on December 21, 1965, that he was recommending her dismissal from Government service. By letter dated December 28, 1965, and given to Plaintiff by hand on January 3, 1966, Defendant Gardner, through his agent David Seeley, dismissed Plaintiff as of January 7, 1966.

IX.

Plaintiff promptly sought to learn what procedures were available to review her termination and to avail herself of all such procedures:

(a) On January 7, 1966, Plaintiff wrote Defendant Gardner requesting a review and hearing, and requesting advice as to her rights of review and appeal within and without USOE and HEW, including any such procedures available within CSC. On January 10 and February 1, 1966, Defendant Gardner, through his agents, responded that Plaintiff had no right to a review or hearing within USOE or HEW, and that her only appeal lay through a complaint to CSC under 5 C.F.R. §315.806, alleging that her termination was "based on political reasons not required by statute."

(b) Plaintiff timely appealed to CSC alleging that her termination was "based on political reasons

not required by statute." On August 31, 1966, Defendants Macy, Hampton and Andolsek, through their agents, ruled that Plaintiff's appeal had not alleged facts and circumstances within the purview of 5 C.F.R. §315.806. In so ruling, these Defendants, through their agents, found that "the organizational activities and affiliation supporting Miss Holden's complaint of political discrimination may be recognized as engaged in programs seeking to influence the formulation of public policy, and to promote political action, in the field of civil rights," but held that the term "political reasons" in section 315.806 applied only to "partisan political discrimination."

X.

Plaintiff was discharged because of her expression of political views.

(a) Her discharge for this reason violated the freedom of speech guaranteed her by the First Amendment of the Constitution of the United States.

(b) Her discharge for this reason also violated her rights under the Act of August 2, 1939, 5 U.S.C. §7324(b) (Hatch Act), which provides that all employees in the Executive Branch of the Federal Government have the right "to express their opinions on all political subjects and candidates."

(c) Her discharge for this reason also constituted political discrimination forbidden by 5 C.F.R. §713.401.

XI.

Plaintiff's discharge was illegal because it was accomplished without regard to procedural protections guaranteed Plaintiff, and others in her position, by the due process clause of the Fifth Amendment of the Constitution of the United States, and in violation of applicable laws of the United States and regulations of HEW and CSC, including but not limited to the following:

(a) Defendants Gardner and Howe, and their agents, failed to comply with required procedures designed to inform Plaintiff of her supervisors' evaluation of her performance and to give her an adequate opportunity to correct or explain the purported unsatisfactory conduct and character traits falsely attributed to her. As a result Plaintiff was denied "a full and fair trial" during her probationary period, in violation of due process and of Chapter V, Guide 1 of HEW regulations codified in the Personnel Guide for Supervisors.

(1) No signed statement certifying that Plaintiff's performance, conduct and general traits of character had been found unsatisfactory, or recommending that Plaintiff should not be retained beyond the probationary

period, was prepared, discussed with Plaintiff, or submitted through supervisory channels during the ninth or tenth months of Plaintiff's probationary period. This failure was in violation of: the Act of September 30, 1950, 5 U.S.C. §§4301-07 (Performance Rating Act); Chapter 315, Subchapter 8-3(a)(5) of CSC regulations codified in the Federal Personnel Manual; and Chapter V, Guide 4, of HEW regulations codified in the Personnel Guide for Supervisors.

(2) Prior to the aforementioned conference of December 21, 1965, Plaintiff was never told of any shortcomings in her work, nor was there any performance evaluation or discussion thereof with her as part of the day-to-day work activities and supervision of Plaintiff. This failure was in violation of Chapter IV, Guide 9, and Chapter V, Guide 4, of HEW regulations codified in the Personnel Guide for Supervisors.

(3) Plaintiff was never "given enough factual information about [her] performance or conduct so that the basis for the action is clear," in violation of Chapter VII, Guide 2 of HEW regulations codified in the Personnel Guide for Supervisors.

(b) Plaintiff was denied the rights of notice, detailed charges, and reply, in violation of section 6 of

the Act of August 24, 1912, 5 U.S.C. §7501 (Lloyd-LaFollette Act), and 5 C.F.R. §315.805 (dealing with termination for conduct before appointment, as in the case of political beliefs and expressions held and made before appointment). Defendants Gardner's and Howe's failure, through their agents, to grant Plaintiff a hearing was also an abuse of discretion under section 6 of the Act of August 24, 1912, 5 U.S.C. §7501 (Lloyd-LaFollette Act).

XII.

The failure of Defendants Macy, Hampton, and Andolsek, through their agents, to entertain Plaintiff's appeal based on her allegation that her termination was for "political reasons not required by statute" violated 5 C.F.R. §315.806. In addition, these Defendants' failure to take testimony from witnesses or to accord Plaintiff a hearing on this appeal violated 5 C.F.R. §772.304, and was an abuse of discretion under Chapter 772, Subchapter 3-2(h) of CSC regulations codified in the Federal Personnel Manual.

XIII.

As a result of Defendants' wrongful actions, Plaintiff has been injured by loss of earnings, by extensive pain, suffering and anguish, and by damage to her professional reputation as a sociologist.

XIV.

Plaintiff has exhausted her available administrative remedies, is without adequate remedy at law and will suffer irreparable injury unless the Court grants the relief hereinafter prayed.

WHEREFORE, Plaintiff prays for judgment against Defendants

1. Declaring that Plaintiff was unlawfully discharged from her position as Research and Program Specialist in the Office of Equal Educational Opportunities, USOE, HEW.

2. Directing that Plaintiff be restored to the position from which she was unlawfully removed.

3. Directing, in accordance with the provisions of the Act of March 30, 1966, 5 U.S.C. §652b (Back Pay Act of 1966), that Plaintiff be paid her salary, including amounts representing such salary increases and promotions as Plaintiff should reasonably have received since January 7, 1966, with interest.

4. Directing, in accordance with the provisions of the Act of March 30, 1966, 5 U.S.C. §652b (Back Pay Act of 1966), that Plaintiff be deemed for all purposes, including successful completion of her probationary period, to have rendered satisfactory service during the period her unlawful termination was in effect.

5. Enjoining any future wrongful dismissal of Plaintiff without due process of law or on account of her exercise of her constitutional rights of freedom of speech.

6. Awarding Plaintiff damages of $25,000 for the injuries alleged in Paragraph XIII, plus reasonable attorney's fees.

7. Directing such other relief as this Court may deem just and proper.

Respectfully submitted,

Armand Derfner

[FILED March 20, 1969]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and move the Court to enter summary judgment against plaintiff and in favor of the defendants for the reason that the complaint, the certified copies of the administrative records of the Department of Health, Education and Welfare (Exhibit A), the administrative records of the United States Civil Service Commission (Exhibit B) and certified copies of subchapter 8 of chapter 315 and subchapters 2 and 3 of chapter 772 of the Federal Personnel Manual (Exhibit C) (all exhibits attached hereto and made a part hereof) concerning plaintiff, show that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

DAVID G. BRESS
United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

WILLIAM A. MINER, Attorney
Department of Justice

[FILED March 20, 1969]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDANTS'
STATEMENT OF MATERIAL FACTS
PURSUANT TO LOCAL RULE 9(h)

1. This is an employee discharge case. Plaintiff was appointed to the position of Education Research and Program Specialist, GS-11, in the Equal Educational Opportunities Program, Office of Education, Department of Health, Education and Welfare, effective January 11, 1965. This appointment was subject to completion of a one-year probationary period. (Comp. Par. V)

2. On December 21, 1965, plaintiff was orally advised by David S. Sealey, then Acting Assistant Commissioner of Education, that her employment was to be terminated during her probationary period. (Comp. Par. VIII).

3. By letter dated December 28, 1965, plaintiff was officially notified that her employment would be terminated effective January 7, 1966, for the reasons that:

1. "Your failure to accept direction without resentment and bad grace."

2. "Your failure to cooperate with other staff members in gathering information from files assigned to your charge."

3. "Your failure to use sound judgment in handling inquiries and proposals assigned to you for staff work." (Comp. Par. VII, Exhibit A).

4. By a letter dated January 7, 1966, plaintiff requested a hearing on her discharge and other information relative to the grounds for her separation and rights of review. (Comp. Par. IX, Exhibit A).

5. James C. O'Brien, then Director of Personnel for the Department, replied by letter dated January 10, 1966, advising plaintiff of her rights and enclosing copies of the Department's rules and procedures and of the Civil Service Commission rules and procedures. (Comp. Par. IX, Exhibit A).

6. Under date of January 17, 1966, plaintiff filed an appeal to the Appeals Examining Office, U.S. Civil Service Commission, with affidavit attached. (Comp. Par. IX, Exhibit B, Enclosure 1).

7. By a letter dated May 6, 1966, from James T. Masterson, Chief, Appeals Examining Office, to Paul E. Miller, Esquire, then attorney for plaintiff, with carbon copy to plaintiff, plaintiff was notified that her appeal

had been denied and advising her of her right to appeal to the Board of Appeals and Review. (Exhibit B, Enclosure 12).

8. Under date of May 11, 1966, Paul E. Miller, Esquire, filed an appeal on behalf of plaintiff to the Board of Appeals and Review from the decision of the Appeals Examining Office. (Comp. Par. IX, and Exhibit B, Enclosure 13).

9. In a letter dated August 31, 1966, from William P. Berzak, Acting Chairman, Board of Appeals and Review to Mr. Paul E. Miller as attorney for plaintiff, plaintiff was notified that the Board of Appeals and Review had sustained the findings of the Appeals Examining Office and had denied plaintiff's appeal. (Comp. Par. IX and Exhibit B, Enclosure 15).

10. On November 9, 1967, plaintiff filed this action in this Court.

DAVID G. BRESS
United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

WILLIAM A. MINER, Attorney
Department of Justice

[FILED May 8, 1969]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now plaintiff by her attorneys and hereby moves the Court to enter summary judgment against the defendants either granting the relief set forth in the prayer in the complaint herein or else remanding this matter for a hearing to the Civil Service Commission pursuant to 5 C.F.R. Section 772.304 to assess the validity of plaintiff's claim that she was discharged in violation of her rights under the First Amendment. The grounds for summary judgment are that the complaint and answer, Plaintiff's Affidavit and Exhibit A, and Defendants' Exhibits A, B, and C all show that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment on her claim as a matter of law, as is more fully set forth in her Statement of Material Facts, Affidavit, Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment and in

support of Plaintiff's Motion for Summary Judgment, and the record herein.

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Attorneys for Plaintiff

[FILED May 8, 1969]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLAINTIFF'S
STATEMENT OF MATERIAL FACTS
PURSUANT TO LOCAL RULE 9(h)

1. When plaintiff's appointment to her position in the Equal Educational Opportunities Program (EEOP) of the Office of Education (OE) in the Department of Health, Education, and Welfare (HEW) was approved by EEOP's Acting Director, David Seeley, Seeley was aware of plaintiff's extensive professional involvement with the problems of race relations, especially in the field of education, and her history of social activism and commitment in support of integration, including her leadership role in the Congress of Racial Equality (CORE) (Complaint, paras. IV and VI; Defendants' Exhibit A, Nos. 1 and 10; Plaintiff's Affidavit paras. 1-4).

2. Plaintiff has consistently contended that, at all times while employed in EEOP, she conducted herself properly, performed all her assigned duties thoroughly, efficiently, honestly, and capably, relied upon reason and sound judgment rather than emotion, followed whatever directions were given to her readily and faithfully,

and worked harmoniously with her fellow staff members and supervisors (Complaint, para. V; Defendants' Exhibit A, No. 14; Plaintiff's Affidavit, para. 5).

3. Plaintiff's superiors, including Seeley, and her peers recognized her competence and EEOP's need for her abilities (Defendants' Exhibit A, Nos. 14 and 16; Defendants' Exhibit B, No. 1; Plaintiff's Affidavit, paras. 7, 11, and 12).

4. At no time before December 21, 1965, was plaintiff notified by anyone, including those in authority over her, that her work was unsatisfactory or that her performance was defective in any manner (Complaint, para. XI(a)(2); Defendants' Exhibit A, Nos. 14, 16, and 18; Plaintiff's Affidavit, para. 6).

5. No signed statement certifying that Plaintiff's performance, conduct, and general traits of character had been found unsatisfactory and recommending that plaintiff not be retained beyond the probationary period was even prepared, let alone discussed with plaintiff or submitted by plaintiff's supervisor, during either October or November, 1965, or until December 27, 1965 (Complaint, para. XI(a)(1); Defendants' Exhibit A, No. 6; Plaintiff's Affidavit, para. 6).

6. Plaintiff was never adequately supervised on a day-to-day basis, particularly by Seeley, who observed

her from a distance and did not discuss her work with her until December 21, 1965 (Complaint, para. XI(a)(2); Defendants' Exhibit A, Nos. 5, 14, and 16; Plaintiff's Affidavit, paras. 6 and 12).

7. Plaintiff continued to be active outside of office hours in vigorously seeking to advance the cause of civil rights and integration and in playing a leading role in the Washington chapter of CORE's desegregated housing program, which included peaceful public demonstrations (Complaint, para. VI; Defendants' Exhibit B, No. 10; Plaintiff's Affidavit, para. 10).

8. Plaintiff has always contended that her civil rights activities and affiliation were in no way inconsistent with her official duties and had no adverse impact upon her ability efficiently to perform her work in EEOP or upon EEOP itself (Complaint, para. VI; Plaintiff's Affidavit, para. 10).

9. Plaintiff has consistently contended that Seeley sought to discourage and suppress EEOP staff participation in civil rights activities and association with civil rights groups outside of office hours, particularly where plaintiff was concerned (Complaint, para. VII; Defendants' Exhibit B, No. 10).

10. Throughout her year of employment with EEOP, plaintiff was openly concerned during office hours with

advancing the cause of equal rights and integration by urging EEOP, and especially Seeley, to take stronger affirmative action to desegregate public schools in the United States (Complaint, paras. VI and VII; Defendants' Exhibit B, No. 10; Plaintiff's Affidavit, paras. 8 and 9).

11. Plaintiff has always contended that her constant pressure upon Seeley to change EEOP policies was in no way inconsistent with, and did not impede proper performance of her official duties, did not threaten Seeley's leadership of EEOP, and had no noticeable impact at all upon the regular operation of EEOP (Plaintiff's Affidavit, paras. 8 and 9).

12. Plaintiff has consistently contended that Seeley opposed her suggestions in each instance and sought to silence, by means of a pattern of intimidating and eliminating those staff members whose ideas differed from his, any internal attempts to questions whether EEOP, under his leadership, was properly fulfilling its statutory role of furthering desegregation (Complaint, para. VII; Defendants' Exhibit B, No. 10; Plaintiff's Affidavit, paras. 9 and 10).

13. On December 21, 1965, Seeley informed plaintiff for the first time that, despite her competence and ability, he would have to recommend that plaintiff not be retained, among other things, because she was inflexible

and not objective in her work because of her strong personal position on civil rights (Complaint, para. VIII; Plaintiff's Affidavit, paras. 11 and 12).

14. On December 23, 1965, Seeley wrote a memorandum to OE's Director of Personnel requesting the termination of plaintiff's services during probation because of her "unwillingness or inability to accept direction except with manifest resentment and bad grace," her "hostile and bitter response to cooperating with staff assigned to gather information from files assigned to her charge" "on one fairly substantial project," and her "lack of objectivity and a tendency to allow her emotional reactions on matters affecting civil rights to cloud sound judgment on how to handle inquiries or proposals assigned to her for staff work" (Defendants' Exhibit A, No. 5).

15. By December 28, 1965, when Seeley wrote to notify plaintiff of the termination of her appointment effective January 7, 1966, he eliminated the limitation to one project of the charge alleging her failure to cooperate and did not refer to her emotional reactions to civil rights matters as the root of her alleged failure to employ sound judgment in handling inquiries and proposals (Defendants' Exhibit A, Nos. 7 and 8).

16. Seeley relied upon plaintiff's alleged civil rights emotionalism in explaining his decision to eliminate plaintiff to the Secretary of HEW and OE's Director of Personnel (Defendants' Exhibit A, Nos. 10 and 16).

17. Plaintiff responded to receipt on January 3, 1966, of her termination notice by requesting on January 7 that HEW give her a review of and hearing on her termination as well as those particulars constituting the factual basis for the action taken against her, "including (1) the names of all persons who have evaluated my work as my supervisors, and (2) documented examples of all incidents and/or actions which would substantiate each of the reasons for the termination." (Complaint, para. IX(a); Defendants' Exhibit A, No. 12; Plaintiff's Affidavit, para. 13).

18. Plaintiff received neither review nor hearing nor names nor examples from HEW (Complaint, paras. IX(a), XI(b), and XII; Defendants' Exhibit A, No. 13, Plaintiff's Affidavit, para. 13).

19. Plaintiff filed a petition with both the Civil Service Commission (the Commission) and OE on January 17, 1966, alleging, inter alia, that her separation violated her First Amendment and Due Process Clause rights and was accomplished by failure to adhere to agency rules and procedures and requesting, among other things, that EEOP

be required to provide her all of the particulars requested in her January 7 letter and to conduct a full and fair hearing on the matter (Defendants' Exhibit A, No. 14 and Exhibit B, No. 1).

20. Neither EEOP nor the Commission ever transmitted to plaintiff any of said particulars or granted her request for a hearing (Complaint, paras. XI and XII; Plaintiff's Affidavit, para. 13).

21. Plaintiff filed timely appeals with the Commission's Appeals Examining Office and thereafter with its Board of Appeals and Review alleging that her termination was "based on political reasons not required by statute," but the Commission ruled first that the existence of staff disagreements over civil rights activity did not support a conclusion that plaintiff was removed for "partisan political considerations" and, upon further appeal, that protection against "partisan political discrimination" did not encompass discrimination based upon "organizational activities and affiliation" with "programs seeking to influence the formulation of public policy, and to promote political action, in the area of civil rights." (Complaint, para. IX(b); Defendants' Exhibit B, Nos. 8, 10, 12, and 15).

22. Plaintiff has consistently maintained, before HEW and the Civil Service Commission and in instituting

this lawsuit, that she was removed from office not for the reasons set forth in her notice of termination, but because of her expression of her political views on the need for forceful administrative action to desegregate American public schools and her affiliation with and leading role in the activities of CORE (Complaint, para. X; Defendants' Exhibit A, No. 14; Defendants' Exhibit B, Nos. 10 and 11).

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[FILED August 1, 1969]

CLERK'S OFFICE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Gladys Anna Holden
Plaintiff

vs. Civil Action No. 2889-67

Robert H. Finch, et al
Defendant

There was entered on the docket Aug. 1, 1969, a judgment granting defendants' motion for summary judgment; denying motion of plaintiff for summary judgment; changing caption as to defendants and dismissing complaint.

ROBERT M. STEARNS, CLERK

Smith, J.

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23523

GLADYS ANNA HOLDEN
Appellant

v.

ROBERT H. FINCH, ET AL.
Appellees

APPEAL FROM A FINAL ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ARGUMENT

I. THE ISSUES AS FORMULATED BY THE GOVERNMENT DO NOT CONFORM TO EITHER THE STATEMENT OF THE CASE OR THE COUNTERSTATEMENT OF THE CASE.

It may be that at the root of the dispute between the parties is an inability to agree upon the issues presented by the Statement of the Case. For this reason, it may be valuable to provide the Court with an analysis of the issues presented by the Government and by Anna Holden to ascertain whether the parties are in fact arguing about the same thing.

Both parties agree that Anna Holden, a probationary employee, was separated from her employment with the federal Government, but there ends the agreement. The Government asks:

> "Was Appellant, a probationary employee, validly separated from her employment when she received advance notice of her proposed removal and the reasons therefor?"

However, nowhere does the Government allege that Anna Holden was given advance notice of any "proposed" removal. Further, the Government has been adamant in presenting its position that "conclusions as to the inadequacies of his [her] performance or conduct," rather than reasons, are all that is required to support a dismissal.

In fact, Anna Holden was orally informed by David Seeley that her employment was being terminated, and subsequently she received official notification of that termination. At no time was it ever characterized as a "proposed removal" so as to allow Anna Holden to in any way rectify any of the alleged inadequacies in her performance or conduct. Of course, Anna Holden would not have had any basis upon which to rectify any of these inadequacies in her performance or conduct since at no time was she given the "reasons" for her discharge, but instead was merely presented with broad, general conclusions to the effect that her performance and conduct were inadequate.

The second issue formulated by the Government deals with the interpretation to be given to certain words contained in a regulation. Thus, the Government asks:

> "Was the Appellant discharged for political reasons within the meaning of 5. C.F.R. § 315.806(b) when she allowed her views on civil rights to impair her works?"

Nowhere in the Statement of the Case or the Counterstatement of the Case is any material presented to support the proposition that Anna Holden's views on civil rights in any way impaired her work.

The Government acknowledges that Anna Holden's appointment was a career-conditional position, and as such was not of the sensitive policy making nature ordinarily reserved for special and excepted appointments. Anna Holden's duties were basically in the area of research and preparation of articles and reports, and the provision of technical information, as set forth in both the Statement and Counterstatement of the Case. However, the Government's Counterstatement of the Case is in error when it states that

> "Appellant was also deeply involved in the cause of civil rights, being an officer in the Congress of Racial Equality ... and an active participant in CORE's desegregation effort."

While it is true that the Appellant is deeply committed to the cause of civil rights, it is not true that she was an officer in the Congress of Racial Equality during the period of time she was employed by the federal Government. Moreover, Anna Holden's outside activities in the field of desegregation were limited to desegregating housing projects during all of the time that she was employed by the federal Government.

Anna Holden's professional interest in school desegregation and her advocacy of that point of view within the Office of Education did not arise out of her emotional

reaction to civil rights, but was the result of long-standing professional judgment leading to a sincere and reasoned conviction that segregation results in inferior education. This conviction, based upon her experience as a sociologist and many years of study, had already been accepted as the law of our land; Brown v. Board of Education, 349 U.S. 294 (1954), and has recently been accepted and reemphasized by that same Court in Alexander v. Holmes Cty. Board of Education, 38 U.S.L.W. 3161 (1969).

Accordingly, it is difficult to see how Anna Holden "allowed her views on civil rights to impair her work." No instances of such impairment were cited in the letter of dismissal. Moreover, David Seeley, who apparently made the judgment, was not permitted to be deposed in connection with this action in the District Court. Accordingly, no basis exists for any such factual assertion.

Finally, the issues formulated by the Government also ignore the vast body of law represented by the statutes and the Constitution of the United States.

Accordingly, if the Court is to consider an issue which conforms to the Statement and Counterstatement of the Case and is broad enough to include the law contained in the statutes and Constitution of the United States,

as well as the executive regulations, the Court must decide whether a probationary employee can be dismissed from federal employment on the basis of her civil rights views and activities.

II. THE GOVERNMENT'S ADMITTED FAILURE TO APPLY THE REGULATIONS THAT GOVERN THE TREATMENT OF PROBATIONARY EMPLOYEES INVALIDATES ITS SUMMARY DISMISSAL OF ANNA HOLDEN.

At pages 13 through 22 of her brief, Anna Holden established that the Department of Health, Education and Welfare failed to follow the clear program established under its Regulations for the supervision, counseling and evaluation of probationary employees. Significantly, the Government now concedes that "the Commission's and HEW's manuals were violated" in connection with Anna Holden's probationary period.

The Government urges, nevertheless, that these admitted violations should not in any way affect the validity of Anna Holden's summary dismissal, since, in the Government's opinion, "the manuals pertinent in this case are more directory than mandatory." The Government itself provides the nexus between these regulations and the dismissal complained of, by finding that

> "The directions relied upon by Appellant were obviously intended to help her supervisors and employers determine whether or not a probationary employee should be retained in the federal service,"

but contends that they

> " ... were not meant to give her 'rights' to a particular pattern in the administrative process, the violation of which would vitiate an otherwise proper discharge."

With regard to the question of the "status" of the Federal Personnel Manual or the Personnel Guide for Supervisors (HEW), it should be noted that Exhibit C to the Government's own motion for Summary Judgment, which was intended to provide the relevant Regulations, included, in addition to certified copies of Subchapter 8 of Chapter 315, various subchapters of the Federal Personnel Manual. Indeed, it seems strange that if the "directions" of the Federal Personnel Manual are not to be construed as part of the relevant law in this matter, the Government should see fit to provide them as the legal basis for its own Motion for Summary Judgment.

The material relied on in the Personnel Guide for Supervisors (HEW), relates to probationers and the procedures for terminating probationers and to that extent falls within the dictates of Subchapter 8-4(7)c of Chapter 315 of the Federal Personnel Manual wherein it is stated that

> " ... in addition to the procedures prescribed by the Commission for terminating probationers, agencies are required to observe their own procedural regulations." (Emphasis added.)

Anna Holden's argument on the relationship between the violation of the probationary regulations and the validity of her discharge is set forth at pages 23

through 32 of her main brief. Specifically, the relationship between the probationary program and the summary dismissal procedure is set forth at pages 23 and 26 of that section, and the law governing dismissals in violation of regulations and requirements of the executive is set forth at pages 26 through 32. Nevertheless, the Government has managed to misconceive the thrust of the Appellant's arguments.

The Government admitting that "the Commission's and HEW's manuals were violated," concludes that " ... the Appellant seeks to establish a right to day-to-day supervision" by contending that " ... her discharge was improper. ..."

Nothing could be further from her mind. The Appellant is not bringing an action against the Government to compel it to supervise and counsel her in accordance with these regulations. Instead, she is simply attempting to establish that her summary dismissal in violation of the agency's own procedures and directives was invalid. The Government itself admits that these procedures and directives were "obviously intended to help her supervisors and employers determine whether or not a probationary employee should be retained in federal service."

It is difficult to understand how the Government can argue that violation of these procedures and directives does not invalidate the summary dismissal procedures peculiar to probationary employment.

In conclusion then, we submit that based upon the Government's admitted violations of the procedures and directives dealing with probationary employees, this Court must hold that Anna Holden's summary dismissal, justified only on the basis of her probationary status, is invalid.

III. THE GOVERNMENT'S LIMITED INTERPRETATION OF "POLITICAL REASON" UNDER 5 C.F.R. § 1315.806(b) IGNORES THE CONSTITUTION OF THE UNITED STATES.

The Government opens its argument with a statement to the effect that absent any statutory or contractual provisions directly to the contrary, a federal employee may be discharged at the discretion of his employer. In support of that proposition, it cites an 1839 case. No response is made by the Government to the arguments and authorities contained at pages 40 through 44 of Anna Holden's Brief, which are all directed to the proposition that the Bill of Rights contains certain limitations upon the exercise of "discretion" by the federal Government in its role as an employer, as well as in countless other situations.

Given this constitutional impetus, the Appellant believes that the relevant statute, the Hatch Act, Act of August 2, 1939, 53 Stat. 1147, 5 U.S.C. § 7324, should similarly be interpreted so as to protect the employee from "exercises of discretion" which violate the rights guaranteed in the Bill of Rights. To close the loop then, all that would be required would be to interpret the regulation, 5 C.F.R. § 315.806(b), so as to provide a forum for the establishment of a record on the merits.

Involving, as it does, fundamental constitutional rights, the Government cannot expect to insulate this case from judicial review. Similar contentions were unsuccessfully made by the Government in a recent Rhode Island District Court case, Murray v. Vaughan, 300 F.Supp. 688 (D.C.R.I. 1969).

In Murray, the plaintiff, previously a Peace Corps volunteer in Chile, instituted a suit seeking declaratory and other equitable relief against the Director of the Peace Corps, and various Selective Service and Department of Justice officials. Murray had been expelled from the Peace Corps by order of the Director without either prior notice or a hearing, for publishing a letter in which he criticized U.S. foreign policy concerning American involvement in Vietnam and of the Peace Corps' policy concerning the freedom of Peace Corps volunteers to criticize U.S. foreign policy. As a result of this dismissal, he was reclassified from his II-A occupational deferment to a I-A by his local board. Murray subsequently received an order to report for induction into the Armed Forces, with which order he did not comply, and was subsequently indicted for refusal to submit to induction.

Murray complained that he had been expelled from the Peace Corps in violation of his First Amendment rights and

in violation of his Fifth Amendment rights to a hearing and notice prior to expulsion as a matter of due process of law, and in violation of his Sixth Amendment rights to confrontation of witnesses, cross-examination and competent counsel to assist him in his expulsion proceedings. He made further arguments in relation to his Selective Service status which are not relevant here. The Government moved to dismiss Murray's complaint on several grounds. In denying the Government's motion to dismiss, the Court moved quickly through the basic federal jurisdictional questions and came to the Government's allegation that no jurisdiction is available over the Peace Corps because Courts cannot interfere with the discretion of the executive in matters involving foreign policy.

The Court recognized that Peace Corps employees serve "at the pleasure of the President," and that the President's discretionary authority to terminate Peace Corps members has been delegated to the Director of the Peace Corps by statute. The Court, however, rejected the Government's position that the Court had no right to interfere with any exercise of the Executive discretion in this matter, holding that

> " ... federal courts have jurisdiction to consider claims that a member of the Executive branch has exercised

> his discretionary authority to hire and fire in such a way or pursuant to such a process as to infringe constitutional rights." 300 F.Supp. at 698.

That is precisely the issue here.

The Government in Murray also raised the "no vested right to federal employment" argument. Taking the same archaic position as in this case, the Government there argued that expulsion from employment is not an inhibition on free speech because its only effect is to render the speaker unemployed and not to prohibit him from speaking. The Court in Murray found that

> "The defense's threshold argument concerning the right of the Peace Corps to terminate its employees for exercise of their constitutional freedoms is unrealistic because it fails to account for the 'chilling effect' upon speech which is wrought by any governmental action whether it be the imposition of a direct restraint on liberty or property or the removal of a government benefit previously given." 300 F.Supp. at 703.

The Court went further, citing the same cases contained in Anna Holden's brief at pages 41 through 43, to conclude that

> " ... Generically speaking, it is now settled that simply because the Government grants a 'privilege' or extends to its citizens the opportunity to exercise their freedom to pursue employment by seeking employment with it, does not mean that the Government can attach conditions to the grant of the privilege or the offering of the opportunity,

> which conditions are inhibitory of constitutional rights, unless the conditions bear some reasonable relationship to the Government interest underlying the privilege granted or the employment opportunity offered." 300 F.Supp. at pages 703-04.

Finally, contrary to the prohibition on judicial review alleged by the Government, the Court in Murray found that

> " ... even if the attached conditions do bear some relationship, it remains for the Court to assess the reasonableness of the conditions by balancing the inhibition on free speech against the governmental interest and the means by which the governmental interest is protected. ... "300 F.Supp. at 704.

Without explicitly stating the standard to be applied in the balancing process, the Court concluded that the

> " ... employee status of the plaintiff Murray and the fact that he served at the pleasure of the Peace Corps Director is not, in and of itself, nearly sufficient to remove his speech from the ambit of First Amendment protection." 300 F.Supp. at 704.

Accordingly, Anna Holden was entitled to those same protections even as a probationary employee.

CONCLUSION

Based on the foregoing, we respectfully request that the Court:

(1) Reverse the Order of the District Court granting the Government's Motion for Summary Judgment;

(2) Enter an Order for the Appellant, Anna Holden,

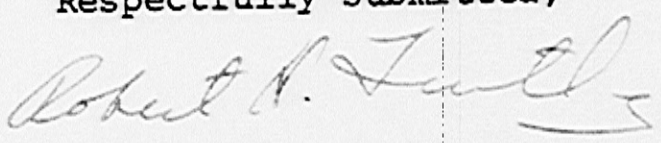
(a) Declaring her dismissal from federal employment invalid,

(b) Requiring her immediate reinstatement to her former position with all the rights and privileges with regard to status, pay grade and time in service that would have accrued to her had she not been unlawfully dismissed,

(c) Awarding her back pay in an amount sufficient to cover the amount she would have been paid between her unlawful dismissal and her reinstatement, and

(d) Such other relief as is deemed necessary and proper.

Respectfully submitted,



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